

U.S. DEPARTMENT OF AGRICULTURE - OFFICE OF ETHICS

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SUBJECT: PARTICIPATION IN NON-FEDERAL ORGANIZATIONS

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1. Purpose

This issuance provides guidance to U.S. Department of Agriculture (USDA or Department) managers, ethics advisors, and individual employees to ensure that employee membership and participation in non-Federal organizations is accomplished in accordance with ethics regulation and law.

2. General

There are many non-Federal organizations in which USDA employees participate. They include for-profit corporations; non-profit corporations; corporations created by Federal law that have been privatized (not subject to USDA management or supervision); partnerships; and civic, religious, educational, professional, and scientific organizations. Being active in such non-Federal organizations not only serves the interests of the groups, it is also a right we hold as citizens within a free society. Most of these non-Federal organizations, such as civic, religious and fraternal associations, have little or no direct involvement with USDA or the Federal government. Other non-Federal groups, particularly professional associations and scientific societies, have purposes that also serve to benefit the Department's interests either by enhancing the skills of our employees; serving as vehicles by which substantive programmatic information is exchanged; and/or engaging in projects and programs that complement the Department's activities. When such mutual interest exists, USDA offices and component agencies may encourage their employees to be active in such non-Federal organizations. Furthermore, unless an employee is compensated for participation in a non-Federal organization and is required to file a financial disclosure report, no prior approval is required from the employee's USDA office or component agency (see 5 CFR Part 8301). That being said, the interests of USDA and such non-Federal organizations are not identical. This separateness must be respected because of the conflict of interest laws and ethics regulations.

USDA offices and component agencies have reasonable administrative discretion to facilitate employee participation in non-Federal organizations. For example:

- * To assist USDA employees with their efforts to participate officially in non-Federal organizations, USDA offices and component agencies may make available official time and may provide travel funds to: attend subject matter/technical (not administrative) meetings of non-Federal organizations if in the interest of the Department; make presentations at such meetings; partake in training programs related to official duties; and participate in similar activities if in the interest of the Department. Upon a determination that employee participation is in the best interest of the Department, management may approve the use of official time and equipment to author articles for publication in professional journals and/or to prepare for training programs and presentations;
- * Management may facilitate an employee's wish to serve in a managerial/fiduciary role with such a non-Federal organization in his or her personal capacity by granting administrative leave to accommodate the demands of that role if management sees it in USDA's interest; and

- * If a non-Federal organization is so closely involved with the USDA office or component agency that a continuing but distinct presence in an environment free of conflict is warranted, the respective USDA office or component agency may assign the employee to serve in his or her official capacity in an advisory, liaison or consultative role to the non-Federal organization.

In each of the above instances, USDA offices and component agencies should provide appropriate guidance to their employees regarding the level of delegated authority for determining such assignments.

Despite the institutional and personal benefits that flow from having staff play active roles in related non-Federal organizations, that participation must be in a manner that abides by the laws and regulations that delineate a boundary between USDA as a public body, on the one hand; and related non-Federal organizations, as private bodies, on the other. Many goals and interests may be shared on either side of that boundary, but the institutional interests are still separate. That essential separation is reinforced by the laws governing conflicting interests and regulations designed to assure the impartiality with which we perform our official responsibilities.

For example, an employee who serves in a managerial/fiduciary role (see definition below) with a non-Federal organization in his or her personal capacity is still required to avoid conducting official USDA work on a particular matter in which that non-Federal organization is a party or has an interest (see 5 CFR 2635 Subparts D & E).

3. Exclusion

This issuance does not cover activities subject to political activity restrictions of Federal employees (i.e. the Hatch Act).

4. Authorities

- 18 U.S.C. § 203 - Compensation to Members of Congress, officers, and others in matters affecting the Government.
- 18 U.S.C. § 205 - Activities of officers and employees in claims against and other matters affecting the Government.
- 18 U.S.C. § 208 - Acts affecting a personal financial interest.
- 18 U.S.C. § 209 - Salary of Government officials and employees payable only by United States.
- 18 U.S.C. § 1913 - Lobbying with appropriated moneys.
- 31 U.S.C. § 1353 - Acceptance of travel and related expenses from non-Federal sources.
- 5 CFR Part 2635, subpart D - Conflicting Financial Interests.
- 5 CFR Part 2635, subpart E - Impartiality in Performing Official Duties.

5 CFR Part 2635, subpart G - Misuse of Position.

5 CFR § 2635.808 - Fundraising activities.

Office of Legal Counsel, U.S. Department of Justice, Memoranda of June 22, 1994; November 19, 1996; and August 24, 1998. January 2, 1998, Memorandum from the Associate General Counsel, Office of the General Counsel, USDA, to Agency Heads titled, "Official Participation by Federal Officials on Boards of Directors of Outside Organizations": (OGC Memorandum).

5. Definitions

Active Participant - One who serves with a non-Federal organization as an official, committee or subcommittee chairperson, spokesperson, fundraiser, attorney, agent, contractor, or one who participates in directing the activities of the organization. Undertaking "management of a non-Federal organization" (defined below) or exercising "managerial/fiduciary responsibility" (defined below) with regard to a "non-Federal organization" (defined below) also would be active participation, as would devoting significant time to promoting specific programs of the organization. Membership, payment of dues, the donation or solicitation of financial support, attending conferences, and contributing to the organization's publications would not, by themselves, constitute active participation [see 5 CFR § 2635.502(b)(1)(v)].

Administrative Roles - Handling those matters or issues related to the management of the business or internal affairs of a non-Federal organization. Examples of business or internal affairs include: organizational fund management, dues collection, membership solicitation, election of officers, or deciding on bylaw resolutions.

Advisory, Liaison or Consultative Role - References to this term herein are with respect to service to the governing board of a non-Federal organization. In this capacity the employee's sole focus is to represent USDA for the purpose of exchanging comments, views, or opinions regarding those matters in which USDA has an interest. Generally, this role would exclude: service in "administrative roles;" "management of non-Federal organizations;" or the exercise of "fiduciary responsibilities."

Behind-the-Scenes - Conducting non-official work for a non-Federal organization that includes: uncompensated assistance in the development of a matter that is to be presented before a Federal agency. For example, "behind-the-scenes" work could involve drafting a document for submission to a Federal agency and identifying the Federal recipient. However, presenting a document to a Federal agency, arguing the merits of the work to a Federal employee, signing the document being submitted by the non-Federal organization, or identifying yourself within the document package, would not be "behind-the-scenes" work.

Compensation - For purposes of this issuance, compensation includes any form of consideration, remuneration or income for service given.

Fundraising - The raising of funds for a non-Federal organization by soliciting cash contributions, in-kind donations of services or goods, or grants from other organizations or government agencies.

Management of a Non-Federal Organization - Legal responsibility for making decisions, including financial decisions, for the organization. Used synonymously with "managerial/fiduciary responsibility" (defined below).

Managerial/Fiduciary Responsibility - For purposes of this issuance, this means service as an officer of the non-Federal organization (e.g., president, vice-president, secretary, treasurer), or in the role of a member of the board of directors or trustees that includes voting authority for organization matters, or as a general partner in a partnership. This term refers to those persons charged with a legal duty (under State law) to direct or manage the organization. It generally does not include persons who perform advisory roles, or serve in topical committee chair positions. One who exercises fiduciary responsibility for a non-Federal organization also would be an "active participant" (defined above).

Note: An individual may exercise managerial/fiduciary responsibilities under State law, but not be an officer, director, or trustee. In such cases, the individual still would be an active participant.

Membership - A person belongs to a non-Federal organization. Membership, by itself, does not make one an "active participant" (defined above).

Non-Federal Organization - This is any non-Federal entity. The term includes for-profit corporations; non-profit corporations; corporations created by Federal law that have been privatized (not subject to USDA management or supervision; partnerships; and civic, religious, educational, professional, and scientific organizations.

Official Capacity or Participation - As used herein, this term refers to direct participation with a non-Federal organization primarily for the purpose of representing the interests of USDA or the Federal government. Official participation means that one or more of the following may be said of your participation with the organization: it is derived from your Federal position, title or authority; it entails official positions or policies of USDA; it occurs on official time; and/or it involves expenditure of appropriated funds. Official participation does not include taking an administrative role in a non-Federal organization.

Personal Capacity or Participation - This term refers to participation in a non-Federal organization in one's private capacity. Personal participation means that your participation in the organization is not derived from your Federal position, title or authority; does not entail official positions or policies of USDA; does not occur on official time; and does not involve the expenditure of appropriated funds.

Prohibited Source - As defined at 5 CFR § 2635.203(d) and as applied to USDA, a prohibited source is any person who:

- * Seeks official action by USDA;
- * Does business or seeks to do business with USDA;
- * Conducts activities regulated by USDA;
- * Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or
- * Is an organization a majority of whose members are described above.

Represent on Behalf of a Non-Federal Organization - This term refers to knowingly attempting to influence an official action on a matter in which the Federal government has an interest by making a communication to, or appearance before, a Federal officer or employee. The term does not include the communication of technical information. (*Compare with "Behind-the-Scenes" defined above.*)

Substantive Items - This refers to matters or issues directly related to USDA's mission that will enhance the professional development or skills of the employee in his or her current position, or those matters officially sponsored/sanctioned by USDA; e.g., symposia, seminars, training workshops, etc.

6. Personal Participation

Personal participation is broader than membership, and includes taking an active role in, or being an "active participant" of a non-Federal organization in your personal, unofficial capacity. Having USDA employees take leadership roles in many non-Federal organizations reflects well on the Department as a resource of professional expertise and talent. In some scientific disciplines, a leadership role is a prerequisite to one's professional advancement. For that reason, USDA offices and component agencies may support their employees in such participation. For example, with the approval of your management official, you may be granted administrative leave to attend and to participate in the conduct of business meetings of a non-Federal organization.

6.1. Fundraising in One's Personal Capacity

While a USDA employee who is a member of a non-Federal organization may participate in fundraising on behalf of the organization, there are limits on the extent of such participation. You can fundraise in your personal capacity if you do so in such a fashion that it is totally divorced from your Federal job. Accordingly, you may fundraise on your own time using non-Federal resources provided that you adhere to the following guidelines:

- * First, under 5 CFR Part 950, the Combined Federal Campaign (CFC) is the only generally authorized fundraising permitted in the Federal workplace. Other than as part of CFC, you may not solicit donations on behalf of a non-Federal organization inside a Federal workplace. (This prohibition also would preclude mailing solicitations to Federal employees at their official addresses, or targeting Federal employees for solicitation.)
- * Second, under 5 CFR § 2635.808(c), you may not personally solicit funds or donations from either: (1) official subordinates; or (2) persons whom you know to be "prohibited sources" to USDA.

If you are a Government employee other than a special Government employee, a "prohibited source" is any person who is:

1. Seeking official action by your agency.
2. Does business with or seeks to do business with your agency.
3. Conducts activity regulated by your agency.
4. Has interests that may be substantially affected by performance or non-performance of your official duties.
5. Is an organization the majority of whose members are described in 1. through 4. above.

If you are a special Government employee, a prohibited source is a person who is described in 4. above.

Employees engaged in otherwise permitted fundraising still must be mindful not to use their official title, position, or any authority associated with their public office to further the fundraising effort.

6.2. Lobbying in One's Personal Capacity

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." (See 5 U.S.C. § 7211). In *your personal capacity*, you may advocate public pressure on the Congress or directly promote policy positions on behalf of non-Federal organizations to the Congress provided that such lobbying is not paid for with appropriated funds (e.g., official travel, time, etc.); and you do not identify yourself as a USDA employee. (*Compare this section with 7.2. "Lobbying with Appropriated Funds."*)

6.3. Representing an Organization before the Federal Government

Since many non-Federal organizations interact closely with the Federal government, members who are Federal employees face a risk of violating criminal prohibitions if they "represent on behalf of a non-Federal organization" before the Federal government. These rules are two-fold:

- * First, even in your personal capacity and irrespective of whether or not you are compensated for your efforts, you may not represent the interests of the non-Federal organization before USDA or before any other Federal department or agency on any matter of Federal interest (e.g., a grant application, claim against the government, or contract proposal);
- * Second, you may not accept or seek compensation for providing "behind-the-scenes" (defined above) assistance to another who is making such a representation. Compensation here includes partnership shares derived from successful representation before the Federal government.

For example, if not compensated for your efforts, you could draft a grant application for submission to the National Institutes of Health on behalf of a non-Federal organization. You also could inform other organization members of the appropriate Federal officials to be contacted, as well as how best to approach them. Again, you could not be compensated for such efforts. Additionally, even if not compensated, you could neither sign the grant application on behalf of the organization, nor be identified within the document as having provided behind-the-scenes assistance. Furthermore, you could neither call a Federal employee with the intent to influence that individual on that matter, nor make any other personal representations (or appearances) to a Federal department or agency concerning the matter.

6.4. Conflicting Financial Interests and Impartiality Concerns

If you participate in your personal capacity in a non-Federal organization, you must avoid taking official action on matters that could predictably affect the financial interests of that organization. You must avoid even the appearance of impartiality or favoritism.

6.4.1. Simple Membership

Simple "membership" in a non-Federal organization normally will not trigger financial conflict of interest or impartiality concerns.

6.4.2. "Active," Non-managerial Participation

An active participant could be subject to possible disciplinary action for taking official action (whether by decision, recommendation, advice, investigation, etc.) on any matters before him/her or his/her subordinates that affects the interests of the non-Federal organization in which he participates if the circumstances of that official action would cause a reasonable person to question his or her impartiality. This would constitute a loss of impartiality under 5 CFR Part 2635, subpart E. These matters either should be referred to another USDA office or agency employee for action or the Deputy Ethics Official to determine whether an administrative waiver may be justified.

For example, an APHIS employee serving as the chairman of a U.S. Animal Health Association committee convened to address issues related to the mission of the agency may preside over a vote to submit a resolution to APHIS in his or her personal capacity and not in his official capacity. The employee must avoid taking any official (agency) action as to the association if the circumstances of that action would cause a reasonable person to question his impartiality without first seeking management's approval with the concurrence of an ethics advisor.

6.4.3. Holding Managerial/Fiduciary or Employment Roles in One's Personal Capacity

In a personal capacity, a Federal employee may serve in a managerial/fiduciary or employment role (officer, director, trustee, general partner or employee with a non-Federal organization). However, a Federal employee who serves in such a role subjects himself or herself to potential criminal penalties should he or she take official action on matters involving the non-Federal organization. If you serve as a fiduciary or an employee in a non-Federal organization, then you are considered, for purposes of 18 U.S.C. § 208, to possess the financial interests of the organization. In this light, it should be remembered that USDA may not pay for travel (see Section 6.5.), expenses, official time, supplies, and equipment use that is for conducting the administrative purposes of the organization, as that could convert the participation from personal to official. (*Compare this with section 7.4.2. "Holding Managerial/Fiduciary or Employment Roles in One's Official Capacity."*)

6.5. Travel Costs

Federal travel funds generally may not be used in connection with a USDA employee's participation in a non-Federal organization in his or her personal capacity. Similarly, in terms of personal participation in non-Federal organizations, employees may not use government travel charge cards and may not book government contract airfares. An exception to this rule is discussed in section 8. "Conferences and Internal Business Meetings."

7. Official Participation

A USDA officer or employee may participate in the activities of non-Federal organizations while "on the clock" and at government expense for the purposes of giving/receiving training or related activities or, in some cases, as a USDA liaison to the organization. What you may do on behalf of the organization in an official governmental capacity is more restrictive than in your personal capacity.

7.1. Fundraising in One's Official Capacity

Under 5 CFR § 2635.808(c), absent explicit authority contained in a statute, Executive Order, or regulation, an employee may not participate in an official capacity in fundraising for a non-Federal organization. The only generally-authorized official participation in fundraising is in connection with the CFC under 5 CFR Part 950. You MAY, however, deliver an official speech (one given in your official capacity) at a fundraiser which addresses topics relevant to your official duties at USDA, provided your office or component agency has determined that the event is a proper forum for the delivery of such a speech and you do NOT request donations or other support for the organization.

7.2. Lobbying with Appropriated Funds

Under 18 U.S.C. § 1913, Federal employees must avoid using appropriated funds to engage in grass roots lobbying activity to pressure Congress regarding legislation (e.g., on official time, in official capacity, or with government resources).

7.3. Dual Compensation

Under 18 U.S.C. § 209, you may not accept or seek compensation from a non-Federal source for performing your official duties. If you are participating in a non-Federal organization in your official capacity, the Federal government is paying you through your Federal salary for such participation. Accepting a supplemental payment from a non-Federal organization directly related to your official participation would constitute unlawful dual compensation, whether by way of salary, contract payment, or honorarium.

Note: Acceptance of travel costs on behalf of USDA in accordance with 31 U.S.C. § 1353 is neither dual compensation nor an improper augmentation of appropriated funds.

7.4. Official Involvement and Conflicting Financial Interests

7.4.1. Non-fiduciary and Agency Liaison Roles

Non-Fiduciary Roles. If you hold a membership or a position in a non-Federal organization that has no fiduciary responsibility to that organization and does not create an employment relationship, there are no ethical prohibitions with simply holding that membership or serving in that non-fiduciary position in an official capacity. Non-fiduciary positions could include serving as a chair or member of a working committee or subcommittee that deals with technical or professional matters but not with internal administrative matters in the organization; participating in the organization in an advisory, liaison, or consultative role (see "Service as a USDA Liaison" below); or serving as an officer in the organization if it is clear that you owe no fiduciary duty to the organization. The Office of Legal Counsel ("OLC") in the Department of Justice (DOJ) has determined that a government employee's service as a director of a non-Federal organization does not violate 18 U.S.C. 208 if the rules of the organization designate the Federal official as a member of the board of the organization and neither the rules of the organization nor state law impose a fiduciary duty to the organization on such a director. OLC Memorandum, June 22, 1994, p.3. The OLC also has determined that a government employee's service as the chair of a working committee or subcommittee of a non-Federal organization does not violate 18 U.S.C. 208 if the position imposes no fiduciary duty, creates no employment relationship, and does not deal only with administrative matters in the organization. OLC Memorandum, August 24, 1998, p.3.

However, where a Federal employee serves in a non-Federal organization in a non-fiduciary role, other ethics concerns remain. They include acceptance of improper gifts by the employee, fundraising, lobbying, and dual compensation. Other legal, non-ethics related concerns also can arise, such as scope of employment (whether your activities for your organization are within the scope of your Federal duties for purposes of personal or Federal liability) and augmentation of appropriated funds by solicitation and acceptance of gifts to USDA or to your office or agency within USDA.

Service as USDA Liaison. Where a non-Federal organization is closely aligned with a USDA program, it may be in your office's or agency's interest to have you participate in a liaison capacity with the governing board of that organization. In such capacity, you are present solely as a USDA representative. Ethics problems concerning service in that position normally do not arise because you are performing an assigned duty and are not legally responsible for the management of the organization. In such a role you must confine your actions to advice, liaison, or consultation so that it is clear that you represent USDA and have not taken on a fiduciary obligation to the non-Federal organization. To retain the clarity of the advisory, liaison or consultative nature of your role, you must not take on decision-making or administrative responsibility in the non-Federal organization. However, service as the chair or a member of a working committee or subcommittee that imposes no fiduciary duty to the organization, creates no employment relationship, and deals with technical or professional matters and not with internal administrative matters in the organization is permissible as part of an advisory, liaison or consultative role. You also may communicate the Department's interests and policies to the governing body of the organization and inform USDA of the organization's positions. Travel and expenses for fulfilling this liaison role can and should be covered by the Department. (See the example for the Chief of the Forest Service under section 7.4.2. specifically "Statutory Authorization" below.)

7.4.2. Holding Managerial/Fiduciary or Employment Roles in One's Official Capacity

USDA employees generally may not serve *in their official capacities* as officers, directors, trustees, general partners (i.e., as "fiduciaries") or employees with a non-Federal organization. According to the January 2, 1998, OGC Memorandum, "**simple official participation** [in such capacity] constitutes prohibited official participation involving the financial interests of a board on which the officer serves as director." (Emphasis in original.)

Background. The above guidance may appear contrary to past agency and employee practices. The origin of discussions about the official role of Federal employees in non-Federal organizations is a series of memoranda issued by the OLC beginning in June 1994. (Agencies are required to abide by advice of the DOJ as to the meaning of Federal criminal law.) In essence, the OLC memoranda conclude that, generally, 18 U.S.C. § 208 would prohibit Federal employees from serving as fiduciaries or employees of non-Federal organizations in their official capacities. Section 208 prohibits an officer or employee of the executive branch from participating as a government official in any "particular matter" in which an "organization in which he is serving as officer, director, trustee, general partner or employee has a financial interest." The memoranda conclude that the service is itself the participation in a particular matter involving the organization and so the service is per se improper.

Applicability. The restriction does not apply in the following circumstances:

- C *Not applicable to participation in one's personal capacity.* If you are serving in a fiduciary or employment role with a non-Federal organization and do so in your personal capacity, see section 6.4.3. above.
- C
- C *Not applicable to advisory roles.* As discussed in section 7.4.1. above, official advisory roles, however influential, do not trigger this prohibition.
- C *Not applicable to some informal non-Federal organizations.* The OLC memoranda apply the restriction only where a fiduciary obligation or an employment relationship attaches. Some informal non-Federal organizations, such as ad hoc discussion groups, do not have enough formal existence or functions (such as dues collection) to impose any fiduciary duties on members or officers, irrespective of the titles of the officers in the organization, and also do not create an employment relationship. Thus, the restriction does not apply to such organizations. Generally, organizations that impose fiduciary duties on persons holding positions within the organization will be either corporations, profit or non-profit, or partnerships. However, this is not the test for the application of the restriction. The test is whether or not the rules of the organization or state law impose a fiduciary relationship on holders of positions in the organization, or if an employment relationship is created. If either of these occurs, the restriction applies. You should be certain that no fiduciary or employment relationship attaches to your position or actions in a non-Federal organization before you take the position or actions in your official capacity as a Federal employee. You may do this by consultation with your agency ethics officer.

Permissible Official Capacity Service. Where service imposes fiduciary obligations official capacity service is prohibited unless: (1) the service is specifically authorized by statute; or (2) the employee receives an individual waiver under the conflict of interest statute to permit him or her to give official capacity service.

Statutory Authorization. Specific authorization in statute means that the statute will permit or require an incumbent of a specifically named position in the agency to participate in a specifically named position in the non-Federal organization. As an example, 16 U.S.C.A. § 583j-1(a) requires the following: "The Chief of the Forest Service shall be an *ex officio* nonvoting member of the Board [of the National Forest Foundation]." An agency shall confer with the Office of Ethics (OE), USDA, in determining when a statute authorizes official capacity service.

Waiver. The government-wide regulations place stringent requirements on qualifying for an individual waiver of the conflict of interest statute. The Office of Government Ethics, with whom OE must in turn confer, discourages waivers for this purpose. Official capacity service means the agency is participating in running the non-Federal organization; therefore, the agency could find itself held liable for any torts committed by the employee in his or her service on behalf of the non-Federal organization, and possibly for other actions by the organization. Before considering this option, the employing USDA office or agency must be able to articulate a need for USDA to be managing the non-Federal organization that overrides such ethics and legal concerns, and should confer with OGC concerning liability exposure to USDA and to its employees, personally. In the extraordinary case in which a USDA office or agency wishes to issue an individual waiver to permit official capacity service, it must first confer with OE.

8. Conferences and Internal Business Meetings

Many non-Federal organizations schedule internal business or administrative meetings of the organization in conjunction with their conferences and seminars. This often occurs in relation to scientific and professional associations. Agencies often send their professional employees, at government expense and as part of their official duties, to attend and/or to participate in such conferences or seminars. A USDA employee may attend the business meeting of the organization in his or her personal capacity, provided that such attendance occurs outside normal work hours and incurs no incremental travel costs to the government. For example, the business meeting may be held in the evening or at a working lunch. Alternatively, the business meeting may be scheduled for the day before or the day after the conference, in which case management may approve annual or administrative leave for the day in question. In these instances the employee would be expected to cover his or her own lodging and subsistence for that extra day at the conference site.